IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 792

MAX STEPHAN
Petitioner,

v.

THE UNITED STATES OF AMERICA.

On Petition For Writ Of Certiorari To the United States Circuit Court Of Appeals For the Sixth Circuit.

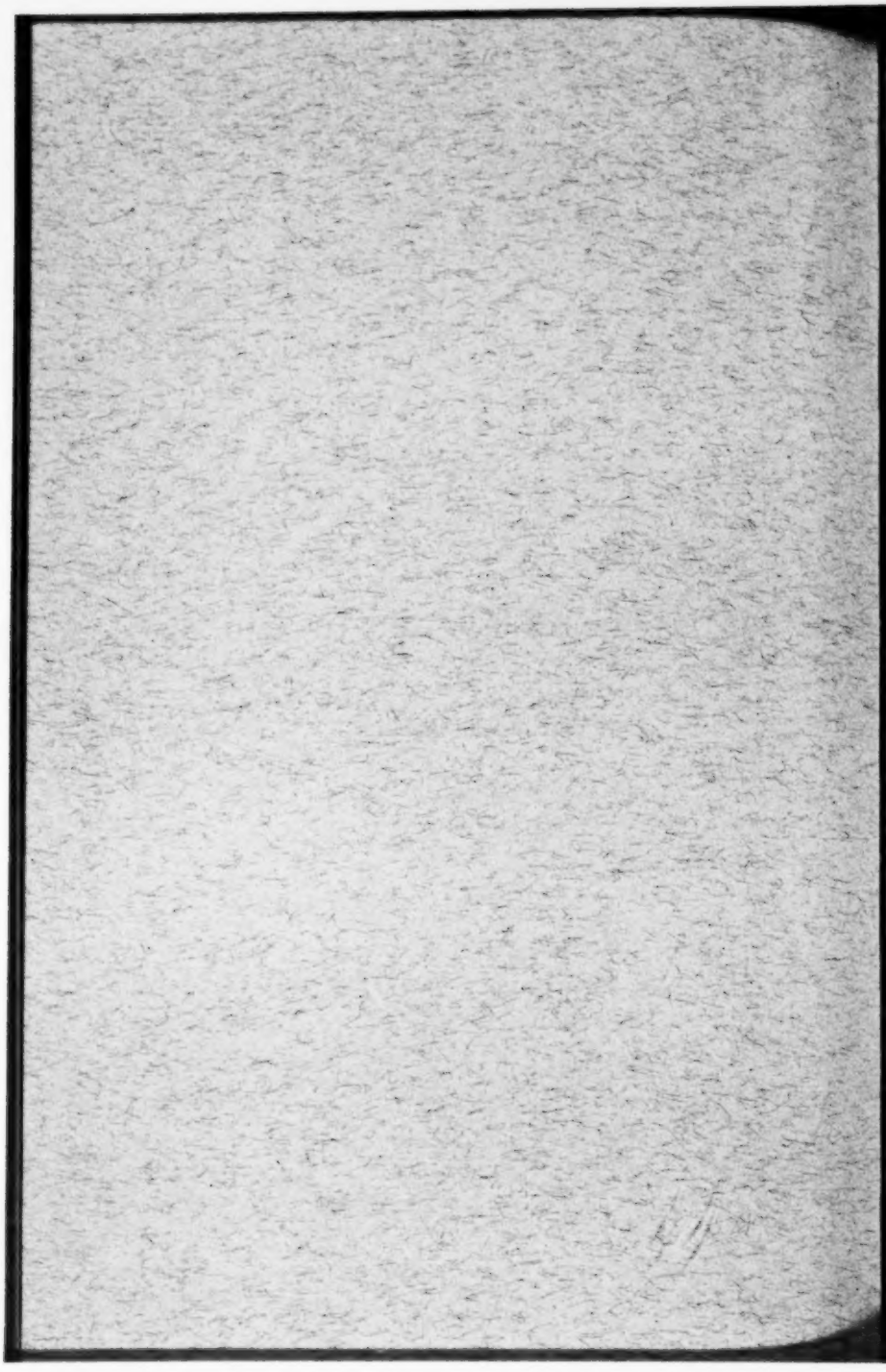
PETITION FOR REHEARING

And Motion for Continuance of Order for Stay of Execution of Judgment.

NICHOLAS SALOWICH,
1401 Barlum Tower,
Detroit, Michigan,
Counsel for Petitioner.

JAMES E. McCABE,
Nashville, Tennessee,
Of Counsel.

MORRS, INC., 170 E. LARNED ST., DETROIT, MICH.



INDEX

List of Authorities Cited

Constitution of the United States

United States Code

Miscellaneous Volumes

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 792

MAX STEPHAN, Petitioner

v.

THE UNITED STATES OF AMERICA.

Motion for Continuance of Order for Stay of Execution of Judgment.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, by his Counsel, and respectfully represents that should this Honorable Court deny the within petition for rehearing, that the order entered by this Court, April 14th, 1943, staying the execution of judgment be not vacated but continued, and in support thereof sets forth as follows:

1. That a motion for a new trial, based upon newly discovered evidence, was filed in the District Court for the Eastern District of Michigan, at Detroit, Michigan, on April 28th, 1943, and was noticed by counsel on April 28th, 1943, to be brought on to be heard on May 10th, 1943.

2. That said motion is made in conformity with Rule 2 (3) of the Rules of Criminal Procedure, promulgated by this Court on May 7th, 1934, under the Act of Feb. 24, 1923, c. 119, 47 Stat. 904 as amended, 18 U.S.C. 688.

3. That unless an order as prayed be entered, irrevocable injury will result.

4. That this is a meritorious motion, made in good faith, and is not filed for the purpose of delay.

Therefore this petitioner respectfully prays that the order by this Court entered April 14th, 1943, staying execution of judgment in the above entitled cause, be not vacated but continued until the proceedings, based upon the motion for a new trial, be finally disposed of.

NICHOLAS SALOWICH,

JAMES E. McCABE,

Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 792

MAX STEPHAN
Petitioner,

v.

THE UNITED STATES OF AMERICA.

On Petition For Writ Of Certiorari To the United States Circuit Court Of Appeals For the Sixth Circuit.

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Max Stephan, Petitioner in the above-entitled matter, respectfully requests the above-entitled Honorable Court that

he be granted a rehearing in the above-entitled cause after decision made and entered therein on April 5, 1943, denying his Petition that a Writ of Certiorari be issued out of the above-entitled Court to the United States Circuit Court of Appeals for the Sixth Circuit so that the decision of the latter Court filed on February 6th, 1943, (affirming the judgment and sentence of the United States District Court in and for the Eastern District of Michigan on August 6th, 1942, that the Petitioner, "said defendant, Max Stephan, be by the said United States Marshal hanged by the neck until he, the said Max Stephen, is dead") might be reviewed by the Supreme Court of the United States and that the decision of said Circuit Court of Appeals be reversed. As grounds for said rehearing Petitioner respectfully sets forth the following:

That Petitioner was not served with a copy of the reply to the Petition filed herein or with Brief for the United States in opposition until on, or about, Saturday, April 5th, 1943, at about 10:00 A. M. of said day, Eastern War Time, said service having been made through the mail addressed to the law offices of counsel for Petitioner in the City of Detroit, Michigan, and that Petitioner has had no opportunity to meet the points made and arguments urged by the Honorable Solicitor General of the United States in opposition to the Respondent's Petition for Writ of Certiorari.

The Petitioner has no means whereby he can ascertain what persuasive force, if any, the Brief for the United States may have had upon the Court in reaching the decision denying the Writ of Certiorari. Whether this Honorable Court accepted Respondent's statements or denied the

Writ upon the inherent weakness of the Petition, counsel could not know. It is upon the assumption that the Court adopted the former course, that Petitioner believes he has suffered a prejudice in not having had an opportunity to be heard after receiving a copy of the Respondent's Brief, it having been received about the same time as the clerk's telegraphic notice of order entered denying petition.

Additional and major reasons which Petitioner submits should justify a reconsideration are that his Petition for Writ of Certiorari presented important questions of Constitutional Law and the serious question of interpretation and construction of the Constitutional definition of Treason.

This question is one of great importance to the Federal Jurisprudence. As it has never been determined by the Supreme Court of the United States it is now respectfully urged that the Honorable Court permit Petitioner the opportunity to be heard on the questions presented to the Appellate Court as to what constitutes Treason against the United States.

That since the entering of the Order denying the Petition for a Writ of Certiorari new evidence of extreme importance to the Constitutional rights of the Petitioner has been discovered, which evidence has prompted a motion for a new trial to be prepared for presentation to the United States District Court for the Eastern District of Michigan.

This motion urges that Petitioner now and at the time he was charged in the Indictment with the crime of Treason was not and could not have been a citizen of the United States nor owe allegiance to the United States under the Constitution (Art. 3, Sec. 3) or U. S. C., Title 18, Ch. 1,

Sec. 1 (March 4, 1909, Ch. 321, par. 341, 35 Stat. 1153) and could not be guilty of the crime of treason.

It is the contention of the Government that petitioner's argument that the overt acts alleged do not prove a crime "is predicated upon an erroneous concept of the essential elements of the crime of treason," and set up in support thereof (page 12 of Brief for the United States in opposition) that "on the breaking out of a war between two nations, the citizens or subjects of the respective belligerents are deemed, by the law of nations, to be enemies of each other" citing cases. The Government must definitely take a stand without ambiguity or equivocation, and cannot solely for the prosecution of its case against Max Stephan, impose upon him all the obligation of citizenship and while the appeal in the instant case was pending, sue Agnes Stephan, his wife, cancel her citizenship, on the grounds of fraud, by proceedings had in the District Court, Detroit, before the Honorable Edward J. Moinet, District Judge, and intern her in a concentration camp as an enemy alien, where she now is. The District Attorney under the law (U. S. C. A., Title 8, Sec. 738) must take steps to cancel citizenship procured by fraud and upon a showing made, the final order, preceding the certificate is voided (sub. "e" of Sec. 738, supra). This was done with Agnes Stephan whose certificate was obtained at the same time, under the same circumstances and on the identical grounds as that of the petitioner, her husband. The certificate of Max Stephan resting in the same category as that of his wife is equally void and he too is an enemy alien as she, yet for the sole purpose of prosecution, his citizenship is unassailed that the Government may say as they do (page 12, Brief, supra) "that the defendant owed allegiance to the United States." Manifestly, this could not be true if he were an

enemy alien as his wife now is, yet the Government persists in this paradox, and in going in diametrically opposite directions at the same time, irreconciliably bespeaks wanton, deliberate persecution.

That, further, additional new evidence has been discovered and included in the motion for a new trial, which evidence goes to the crux of the charge in the Indictment and tends to prove the total lack of intent or motive to commit Treason against the United States. An intention to commit Treason is an offense entirely distinct from the actual commission of that crime. *United States v. Burr,* 25 Fed. Cas. No. 14692 (a), at pp. 13, 14; that the statute under which Petitioner was prosecuted is unconstitutional in that it enlarges upon the Constitutional definition of Treason. Chief Justice Marshall, speaking in the Burr trial (25 Fed. Cas. No. 14692) said: "It is that of which the American people have been most jealous, and therefore, while other crimes are unnoticed they have refused to trust the National Legislature with the definition of this (treason) but have themselves declared in their Constitution that it shall consist ONLY in levying war against the United States, or in adhering to their enemies, giving them aid and comfort." *United States v. Burr,* 25 Fed. Cas. No. 14692.

No argument propounded by the counsel in opposition can reconcile the necessity under International Law of according War prisoners the courtesies due their position and rank with the fact that witness Krug is alleged to be an enemy, a secret agent for, spy for, and secret representative for the German Government (R. Vol. I, pp. 2, 37, 38, 54, 55, 83, 86, 87, 115, 116, 117, 119, 121, 284, 303, 304). (Government's Brief in opposition p. 19).

If Krug was a prisoner of War his status as such precluded the necessity of a charge of treason against petitioner. Krug as the record proves, was an escapee (R. 38) and had not contacted his superiors (R. 111) for nearly twenty months. The only punishment open to Krug under International Law "is disciplinary punishment" (Art. 50, p. 5238, Infra). (Prisoners of War Convention between United States of America and other Powers, signed at Geneva July 27, 1929, Art. 45-49, 50-51).

When Krug escaped from a Canadian War Prisoner's Camp he was a prisoner of War (Art. 45, p. 5237, supra) (R. 38). His status in America was still that of a prisoner of War and it remained such (R. 115) and that status remains unchanged. His total lack of contact with the German Government as proved on the trial (R. 111) negatives the alleged charges that he was an enemy within the constitutional definition of the crime of treason.

Petitioners well appreciate what motions for rehearing mean and what is necessary to exist in order to obtain their allowance. We are well aware that the Honorable Justices of this Court do not formulate orders or opinions excepting only in accord with true law, the facts being understood or admitted.

Being deeply and everlastingly based in the conviction that our cause is right we respectfully and earnestly urge indulgence and patience to reach truth and proper conclusions. We are appealing to this Honorable Court on the highest ground or nature and in furtherance of Justice.

Petitioners have struggled on in the appeal in the faith and well-grounded hope that law and justice will ultimately obtain in the Court in this cause.

Because of no opinion, nor any reason assigned and filed in the denial of the instant original petition for Writ of Certiorari we are at a loss to know just what to say in helpfulness to the Court in support of the present petition for rehearing.

We deem it prudent therefore to address ourselves to the Court to beg their indulgence for permission to make a short statement relying on the fact that, "Federal Appellate Courts, will, in the exercise of a sound discretion, notice error in the trial of a criminal case, although the question was not properly raised by objections below, where the refusal to review would shock the judicial conscience." *Weems v. United States,* 217 U. S. 349, 30 S. Ct. 544; and "There is a well recognized exception to the general rule (passing on the sufficiency of evidence not challenged in trial court) that, in criminal cases involving the life or liberty of the accused, the Appellate Courts may notice and correct plain errors in the trial of the accused which appear to have seriously prejudiced his rights, although those errors were not challenged or reserved by objections, motions, exceptions or assignments of error." *Kelly v. United States,* 76 Fed. (2d) 847; 122 Fed. (2d) 461. "On appeal in a capital case the court will consider the evidence as disclosed by the record to determine whether it was sufficient to support a verdict * * * although the record showed no exception taken to the deficiency of the evidence to support the record." *Lomax v. United States,* 37 App. (D. C.) 414.

The attorneys for Petitioner were not the attorneys on the trial. Because of failure to make timely objections and to save exceptions it was necessary, in order to settle a

proper bill of exceptions, to rely on the face of the record for assignments of error. The Order Settling the Bill of Exceptions (R. Vol. 1, pp. 31, 365, 366) included the entire transcript of all testimony and proceedings in the above entitled cause. On that record twenty-five errors were assigned to the Honorable Circuit Court of Appeals, Sixth Circuit. The opinion of that Court (R. Vol. II, pp. 1-37) commented frequently on the failure of trial counsel to offer timely objections (R. Vol. II, pp. 14, 26, 27, 30, 34) and to save exceptions.

Counsel for Petitioner did not deem it legal or proper to raise the question of dereliction of trial counsel nor damage to the civil rights of the respondent-petitioner due to tactical error of counsel but relied solely on assignments of error predicated upon palpable and incurable error appearing on the face of the record. Nor do we raise the question now except to point out to this Court the apparent prejudice to Petitioner's Constitutional rights to competent counsel especially in a criminal case in which the judgment and sentence was death by hanging. We feel bound to do this believing that the opinion of the Circuit Court of Appeals would have been different had proper objections been made and exceptions saved on the trial on which to base error. It is settled law that counsel cannot waive any rights of a defendant in a criminal case especially one involving the death penalty.

Furthermore, a careful reading of the opinion (R. Vol. II) discloses that the Honorable Court did not follow the Record in its entirety. Petitioner respectfully submits that there is a misconception of the face of the record set out in the opinion of the Honorable Circuit Court of Appeals (R. Vol. II, p. 31).

The original Brief of this Petitioner in Petition for Writ of Certiorari denied April 5, 1943, at pp. 67-70 attempted to point out the error to this Honorable Court and urged that in justice to this Petitioner that he be permitted to address himself to the Court and beg its indulgence so that the entire record might be placed before this Court for examination without regard to technical or tactical errors to the end that justice might be served.

That Petitioner has been advised by his counsel, and believes, that there is merit in his Petition that a Writ of Certiorari should be allowed in the present proceedings and he believes that if counsel can bring to this Honorable Court the actual points heretofore set forth and upon which counsel rely to invoke its jurisdiction, the merits of his cause will be sufficient to entitle him to a reversal.

Jurisdiction

The jurisdiction is invoked under Sec. 240 (a), 28 U. S. C., Section 347 (a). The Petition herein was denied by order of this Honorable Court entered April 5, 1943.

Statement of Facts

Statement of facts fully set forth in original Brief for Petitioner, pp. 25-31.

Questions Presented In the Original Petition

The original Petition filed herein presented the following questions:

1. Do the overt acts in the indictment support the charge of treason, and does the indictment with particularity and certainty charge the crime of treason?
2. Does aid and comfort to an individual for his sole benefit constitute aid and comfort to the enemy country?
3. Did the Court err in permitting witness Krug, a Nazi Luftwaffe Officer, to testify as a competent witness in a capital case in a Federal Court?
4. Did the Court err in permitting witness Krug to testify after giving the Nazi salute, and while attired in the full uniform of an officer of the German Army to the incurable prejudice of the substantial rights of the defendant?
5. Did the Court err in failing to compel witness Krug to answer proper questions on cross-examination?
6. Did the Court err in admitting incompetent, irrelevant, immaterial and obscence testimony which incurably prejudiced the substantial rights of the defendant?
7. Did the Court err in admitting incompetent and irrelevant testimony relative to acts and declarations of Krug elsewhere and subsequent to the overt acts charged in the indictment?
8. Did the Court err in admitting the incompetent and irrelevant exhibits, i. e., epaulets, a Greyhound Bus Company map, a revolver and cart-

ridges, Government's Exhibits 4, 9, 12 and 13, respectively, all of which were prejudicial to the defendant's substantial rights?

9. Did the Court err in failing to direct a verdict for the defendant upon conclusion of the testimony, because there was fatal variance between the indictment and the proof?

10. Did the Court err in failing to direct a verdict for the defendant upon conclusion of the testimony because of the insufficiency of the evidence, and was the verdict of the jury a miscarriage of justice?

11. Should the Court have declared a mistrial during the closing argument when the United States District Attorney made repeated reference to the defendant's failure to produce witnesses and made the direct statement that the defendant had not taken the stand?

12. Did the intemperate, improper and inflammatory remarks, inciting passion, in the closing arguments of the United States District Attorney prejudice the defendant's substantial rights?

13. Did the charge of the Court clearly define the crime of treason?

14. Did the charge of the Court fully, clearly and with particularity define an overt act constituting the crime of treason?

15. Did the charge of the Court fully, clearly and with particularity instruct the jury as to what constitutes 'adhering to the enemy, giving them aid and comfort'?

16. Did the words and phrase which alleged Krug to be, 'a secret agent for,' a 'spy for,' and 'secret representative of said Government of Germany in the furthering and carrying on of its war against

the United States,' incurably prejudice the defendant's substantial rights when the words and phrase were read, for the first time in the trial, by the Court in its charge to the jury; since the only testimony introduced was in direct refutation of those allegations?

17. Did the Court err in permitting the jury during the trial to separate each noon, and go home each night, relying solely on their discretion to protect them from unlawful exposure and the undue outside influences of personal contact, public sentiment, newspapers and radio?

Opinion Of Court Below

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported in 133 Fed. (2d) 87, and is printed in Vol. 2, pp. 14-37 of the Transcript of Record filed with the original Petition for Writ of Certiorari. This opinion affirmed the judgment and sentence of the United States District Court for the Eastern District, Southern Division of Michigan.

ARGUMENT

I.

The indictment is bad. The overt acts alleged standing alone or tacked together do not constitute a crime. The indictment does not allege overt acts which constitute the crime of treason.

Petitioner urges that the indictment is bad; that every indictment, to be sufficient, must have embodied within it, and alleged with certainty and precision, allegations of such acts as constitute overt acts which, standing alone or tacked together, constitute a crime. The overt acts alleged in the indictment in the case at bar (R. 1-6) do not set out a valid cause of action under any statute or law.

It is fundamental that an indictment, to be effective as such, must set forth the constituent elements of a criminal offense; if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based, or if the facts may all be true and yet constitute no offense the indictment is insufficient.

The fact that the counts of an indictment are in proper form will not save them from the Constitutional objection that they do not sufficiently disclose the cause and nature of the accusation.

In the instant case, "the defect is not in form but in substance." *United States v. Cruikshank*, 92 U. S. 542, 556,

and, as reported in *Evans v. United States,* 153 U. S. 606, the Court quoted Lord Chief Justice Holt as saying, "a fact that appears to be innocent cannot be made a crime by adverbs of aggravation."

To permit an indictment to stand which charges as treason a number of alleged "overt acts" which do not or could not constitute treason, would only accomplish a miscarriage of justice.

Were it true that an indictment could contain a series of "overt acts" some of which did not constitute treason, and also that proof of any one of said acts charged in such case would sustain a conviction and the jury be instructed that if they believe any one of the acts to have been proved, they might return a verdict of "guilty as charged in the indictment," then there would be no refuge in the Constitutional guaranty that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act," and the prosecution could assure itself of a conviction by the simple expedient of including in the indictment as an "overt act" any act which might be easily susceptible of proof and impossible for the defendant to deny. In *Terry v. United States* (C. C. A. 9), 7 Fed. (2d) 28, 30, the Court said: "and further a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime."

Petitioner respectfully submits that each overt act of treason as mentioned in the Constitution, constitutes a separate, distinct and complete crime in itself. Each overt act, standing by itself must be a complete charge containing all the elements necessary to charge the crime of treason. (*United States v. Gooding,* 25 U. S. 473, 475; *United States v. Wilson,* 28 Fed. Case No. 16730, p. 718).

Petitioner urges that the indictment alleges overt acts that do not constitute a "charge which brings the accused clearly within the scope and requirements of the statute creating the offense, and so identifies the offense as to enable the accused to fully prepare his defense * * *." *Frisbie v. United States,* 157 U. S. 160, 166, 39 L. Ed. 657.

The crime of treason stands upon peculiar ground. The Constitution of the United States (Const. Art. 3, Sec. 3) does not elaborate the overt acts of treason but uses the limiting words, "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

The U. S. C. Title 18, C. 1, Sec. 1, says: "Whoever owing allegiance to the United States levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." (Mar. 4, 1909, Ch. 321, par. 1, 35 Stat. 1088.)

The adverb *"only"* is defined in Webster's International Dictionary (unabridged) as "no or nothing more or other than; for no other purpose, at no other time, in no otherwise, etc., than; exclusively; solely; merely."

The significance of this word "only" in the context undoubtedly was intended by the framers of the Constitution in defining the crime of treason to give full protection to the citizens by limiting its meannig so that no act of Congress could ever affect the rights of a person charged with that crime. It is to be believed that the design of the framers of the Constitution, and the people who adopted it, was to express the fundamental law in such terms as would embrace every present and future consideration.

The general Principles of Interpretation as followed by this Honorable Court is clearly stated in its own words: "Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts in giving construction thereto, are not at liberty to search for its meaning beyond the instrument."

"To get at the thought or meaning expressed in a statute, a contract or a Constitution, the first resort in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning * * * then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it." *Lake County v. Rollins,* 130 U. S. 662, at page 670. "The great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction." *Ex parte Yerger,* 8 Wall. 85, at page 101.

"Treason embraces the existence both of a state of mind and the commission of overt acts." *United States v. Werner,* 247 Fed. 709. "In order to constitute treason the accused must in general be guilty of some act which has for its direct aim the furtherance of the hostile designs of the

enemy." *United States v. Herberger,* 272 Fed. 290, quoting 30 Fed. Cas. No. 18272. "There can be no doubt that the words 'aid and comfort' are used in the statute in the same sense that they are in the clause of the Constitution defining treason, Art. III, Sec. 3, that is to say in their hostile sense.' *Young v. United States,* 97 U. S. 62. Chief Justice Marshall in the Burr trial, 25 Fed. Cas. No. 14692 said: "It is that of which the American people have been most jealous, and therefore, while other crimes are unnoticed they have refused to trust the National legislature with the definition of this (treason) but have themselves declared in their Constitution that "it shall consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort."

No one of the overt acts alleged in the indictment nor all of them tacked together constitute a crime. The intent to commit a crime cannot be impugned to innocent acts by the mere process of alleging overt acts within the four corners of an indictment thereby raising mere trespasses to the dignity of a public offense, particularly to the crime of treason. "The crime of treason should not be extended by construction to doubtful cases." *Ex parte Bollman,* 8 U. S. 75.

The mere fact that the body of an indictment alleges certain acts, and the form and requisites of an indictment are complied with will not elevate an otherwise innocent act to the degree of an overt act manifesting criminal intent tending toward the completion of a criminal object, nor one that has for its object the furtherance of the hostile designs of an enemy against the United States. "In order to constitute treason the accused must in general be guilty of some act which has for its direct aim the furtherance of the

hostile designs of the enemy while the state of war exists, which act involves a want of loyalty." *United States v. Herberger,* 272 Fed. 290, quoting 30 Fed. Cas. No. 18272. "The intent in giving aid and comfort to the enemy must be to tender such assistance to the enemy of the government, and not merely to assist another as an individual." *United States v. Fricke,* 259 Fed. 673, for, "There may be aid and comfort without treason." *Young v. United States,* 97 U. S. 62. "Without an intent to give aid and comfort to the enemy there is no treason." *Wimmer v. United States,* 264 Fed. 11 (C. C. A. 6).

The hiatus between misprision and actual participation in a criminal conspiracy to commit treason is vast.

This Honorable Court said in *United States v. Cruikshank,* 92 U. S., at page 557, "According to the view we take of these counts, the question is not whether it is enough in general, to describe a statutory offense in the language of the statute, but whether the offense here has been described at all," and at page 559, "but it is needless to pursue the argument further. The conclusion is irresistable that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them."

II.

Petitioner urges that aid and comfort for the sole benefit and comfort of an individual is without the evil intent and motive "to adhere to, give aid and comfort to an enemy" in direct furtherance of the hostile designs of the enemy country and is not treason.

No act alleged in the indictment as an overt act constituting treason can be interpreted as hostile to the United States of America. The one count setting out thirteen overt acts are but a recital of innocent acts toward an individual on his birthday.

The testimony adduced at the trial prove such acts to be harmless in effect and are each and all of them wholly devoid of any color of intent to be disloyal to, or hostile to the United States of America. A criminal intention cannot be assigned to an act merely by alleging it where the act itself does not manifest such intention. *United States v. Robinson*, 259 Fed. 685, at page 690.

An intent can only be inferred from the acts and words of the principals and in the crime of treason such acts must be induced by the intent to directly further the hostile designs of an enemy country together with an active, sympathetic, participating adherence to the enemy country. "In addition to obvious necessary elements, treason as thus defined, embraces the existence both of a state of mind and the commission of overt acts and prescribes why the latter shall be proven * * *. It is conceivable that a defendant

may have this condemned attitude of mind or be what is deemed a 'traitor at heart' and yet not expose himself to treason because he has created no hostile act." *United States v. Werner*, 247 Fed. 709. "Overt acts are such acts as manifest a criminal intention and tends toward the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled * * *. It may be possible to piece bits together of the overt act, but if so, each bit must have the support of two oaths." *United States v. Robinson*, 259 Fed. 694. Overt act must be clear proof, not conjecture or inference." 30 Fed. Cas. No. 18272.

In the *Burr case* it was adduced that men, boats, arms and provisions had been assembled, bullets had been manufactured, incriminating correspondence had been carried on. Chief Justice Marshall speaking in that case *(United States v. Burr*, 25 Fed. Cas. No. 14692) said: "But it is equally clear that an intention to commit treason is an offense entirely distinct from the actual commission of that crime." * * * "The crime really complete was a conspiracy to commit treason, not an actual commission of treason. If these communications were not treason at the instant they were made no lapse of time can make them so. They are not in themselves acts. They may serve to explain the intention with which acts were committed, but they cannot supply these acts if they be not proved." "A conspiracy to resist by force the execution of a law of the United States in particular instances only or a conspiracy for a personal or private, as distinguished from a public and national purpose, is not treason, however great the violence or force, or numbers of the conspirators may be." *United States v. Hanaway*, Fed. Cas. No. 15299 (2 Wall. Jr. 139). "In determining whether defendant is guilty

of adhering to, and giving aid and comfort the question of intent is a vital ingredient of the crime; and though he assisted an enemy alien, whom he knew to be such, he is not guilty where he intended merely to assist him as an individual, and not to give aid and comfort to enemies of the United States." *United States v. Fricke,* 259 Fed. 673.

The intent of this petitioner was adduced on the trial. What did the petitioner do that elicited the charges set forth in the indictment? He met a Nazi flyer through the medium of a third person, and within the first few minutes of their meeting (R. 168) the accused told him "why don't you give up, you haven't got a chance." Verification is found in the Nazi flyer's testimony (R. 95) "you should go back where you come from." "Did he (defendant) say that to you?" Krug answered, "Yes, that is right." This is further corroborated (R. 224, 230, 232).

Petitioner respectfully directs attention to the record (R. 108) where the testimony of Krug further corroborates the lack of intent or motive of the petitioner to do more than give aid to an individual.

> "Q. You remember testifying before the grand jury? A. Yes.
> Q. All right. Did the defendant, Max Stephan, at any time say to you that he wanted to destroy the Government of the United States? A. He wants to destroy the Government?
> Q. Did he ever say to you that he wanted to destroy the Government of the United States? A. No, never. He never said that to me.
> Q. Did you study Latin when you were in high school? A. Language?
> Q. Latin. A. No, I didn't study Latin.

Q. Do you know the meaning of the word 'subvert,' and I will ask the interpreter is there such a word in German the equivalent of our word 'subvert' and the noun 'subversion'?

The Interpreter: No, there isn't.

Mr. Amberson: No such word?

The Interpreter: There isn't, but, of course, it can be expressed in German, yes.

Mr. Amberson: All right.

(Question interpreted.)

The Interpreter: Yes, he knows exactly what 'subvert' means.

Q. (By Mr. Amberson, continuing): Did Max Stephan say anything to you to the effect that he wanted to bring about a subversion of the American Government? A. No, he didn't tell me anything about it.

Q. During your conversation with him, did you say anything to him about destroying the American form of government? A. No.

Q. Have you been made any promise of a parole by the British Government because of your testimony in this case? A. No, they didn't do anything.

Q. Are you expecting any special privileges as a prisoner of war because of the fact that you have come here and volunteered to testify in this case? A. As far as the British or by you?

Mr. Amberson: I think perhaps a translation should be made.

The Interpreter: You mean in Canada?

Mr. Amberson: Yes, that is right.

(Question interpreted.)

A. No, I don't expect anything from the Canadian Government.

Q. (By Mr. Amberson, continuing): Now, did you request of Max Stephan at any time during your conversations any aid from him for the Government of Germany except as it applied to you individually?

(Question interpreted.)

A. No, I didn't.

Q. And that was not your purpose in talking with Max Stephan, was it? A. No.

Q. To secure aid for the Government of Germany? A. It was just my purpose to get back to Germany again.

Q. And it was not your purpose to tear down the Government of the United States, was it? A. Of course not.

Q. Now, you stand today in this court room, witness, as an enemy of our country; that is true, is it? A. Yes, it is.

Q. And those of us who are here in this court room, we are your enemies; that is true, is it not? A. Of course you are.

Q. I ask you, therefore, what is—strike it. You understand from your knowledge of international law that there is no power on earth that can make you testify in this lawsuit unless you wanted to; you know that? A. That is right.

Q. Will you state to the jury then what your purpose is in coming here as an enemy of this country and testifying in this case against a man who is charged with treason against our country; what is your purpose. your object? A. The purpose is to clear out that he didn't do what he is charged with. I was only asked to tell the truth about the case and what is wrong, what FBI has charged him and all the other persons who are charged with having known who I am."

The signed statement given to special agents of the Federal Bureau of Investigation at the time of petitioner's arrest, and introduced on the trial over objection of counsel (R. 218) gives a summary of the acts of petitioner on which the overt acts of treason were predicated and charged in the indictment. In that statement (R. 225) the lack of intent to be disloyal to his country and the total absence

of an evil motive to further the hostile designs of an enemy country is found in petitioner's words: "About 11 o'clock a friend of mine named Bill Nagel, who used to be postmaster in the last war, came into my place, and I asked him for advice. I asked him what he would do if a lady he knew called him up and said she had a German war prisoner in her place. I told him the man wanted to go to Chicago. He agreed that maybe he would help the man get to Chicago." Again (R. 225): "I then closed my place about 12 o'clock. Right after I had closed, the clerk from the Field Hotel rapped on the door and told me about a fellow who looked funny to him, coming to the Field Hotel. The clerk said that this man could be a German War prisoner from Canada. To this I didn't make any comment. He suggested that he bring the fellow over to my place the next morning so I could have a talk with him. I told him not to do that because I didn't want anything to do with him."

The foregoing words in the record are the only utterances in the entire testimony that relate to subversive or treasonable acts and clearly indicate the reason for Krug's (Nazi flyer) presence in Detroit, and a total lack of conspiracy to commit treasonable acts against the United States and directly in furtherance of a hostile design of an enemy Country. The entire record, with these few exceptions, is filled with testimony relating to acts that were purely personal in nature and none of them constitute a crime.

Certain of the alleged "overt acts" merely charge meeting together, conferring together, counseling, or giving false and misleading information. It has been uniformly held that neither utterances nor meeting and conspiring can ever amount to overt acts of Treason. *Wimmer v. United States*, 264 Fed. 11, pp. 12, 13; *Ex parte Bollman*, 18 U.

S. (4 Cranch) 75; *United States v. Hoxie,* 26 Fed. Cas. No. 15407, p. 399. In the case of *Wimmer v. United States,* 264 Fed. 11, at page 13, the Honorable Circuit Court of Appeals, Sixth Circuit, said: "Thus we find, in the constitutionally defined crime, two elements, the intent and the act; neither is dominant. Intent minus the act is not treason, any more than act minus intent is."

Petitioner respectfully avers that there was no overt act of treason laid in the indictment, that it was bad for want of certainty and precision. "How ever flagitious may be the crime of conspiring to subvert by force the government of our Country, such conspiracy is not treason. * * * It is more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases." *Ex parte Bollman,* 8 U. S. (4 Cranch) 75. It is not sufficient that the accused person shall merely have knowledge that another person "was an enemy of the United States." He must actually do some act in furtherance of a hostile design with an evil motive and intent to give aid and comfort to an enemy before he can be guilty of treason. Mere words which tend to conceal the identity of another person is not treason. The doctrine of treason under the Constitution of the United States, hangs upon the intention of the accused to give aid and comfort and adherence to the National enemies of the United States as distinguished from giving aid or comfort to an individual alien enemy in his personal wants and comforts. *United States v. Fricke,* 259 Fed. 673. "Further distinction is found in the very words of the Constitutional definition. Treason is "adhering to their enemies, giving them aid and comfort." Both adherence and giving aid are necessary. To 'favor or support'

is, very likely, 'to adhere'; but it does not carry the idea of giving aid and comfort, unless by a rather remote implication. Hence, it may well be said that adherence by words only is an offense quite distinct from treason."

At page 402 of the *Hoxie case* Justice Livingston made the following pertinent comment: "Once disregard these exceptions, and render the constitutional rule as flexible or comprehensive as it is now suggested to be, and prosecutions for treason will become as common as indictments for petit larcenies, assaults and batteries, or other misdemeanors. If every opposition to law be treason, for very like this is the language we have heard, as all offenses partake in some measure of that quality, who can say how many of them will in time become ranged under the class of treason. Neither you, nor the Court, can feel any ambition of leading the way, in setting a precedent so dangerous, or one that in any degree tend to demolish that barrier which has been raised by the Constitution against constructive treasons." *United States v. Hoxie,* 26 Fed. Cas. No. 15407, at page 399. Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself and getting its treasonable character only from some covert and undeclared intent. * * * "Therefore I have the gravest doubt of the sufficiency of the first and second overt acts of the first count and of those of the second count, which consists of acts that do not openly manifest any treason. Their traitorous character depends upon a covert design and as such it is difficult for me to see how they can conform to the requirement." *United States v. Robinson,* 259 Fed. 685, at page 690. "Every fact necessary to constitute the crime charged must be directly and positively alleged, and nothing can be changed by implication

or intendment." *United States v. Philadelphia & R. Ry. Co.*, 232 Fed. 953, at page 955.

On re-direct examination (R. Vol. I, p. 111) the utter impossibility of Krug to have had contact with any of his superior officers or with the German Government in any manner, was established by the Assistant United States District Attorney as here quoted:

"By Mr. Babcock:

Q. Lieutenant, in what country were you born? A. Germany.

Q. You are a citizen of the Government of Germany? A. That is right.

Q. As well as being a military officer? A. Yes.

The Court: In what part of Germany were you born? A. In Bavaria.

Q. And, of course, you are a subject of the Government of Germany? A. Yes.

Q. Now, Mr. Amberson was asking you about communication with your superior officers— A. (Interposing): Yes, sir.

Q. (Interrupting): Now, as a matter of fact, your communication is all through the Swiss Consul, isn't it? A. Yes.

Q. Any communication you have with the Government of Germany is carried on through the Swiss Consul? A. Yes."

How then can it be claimed that Krug, not having had contact with his superior officers or with the German Government from the 28th day of August, 1940, when he was captured in England (R. Vol. I, page 37) to the 18th day of April, 1942, when he entered the United States illegally (R. Vol. I, p. 38), be said to be "a secret agent for, spy for, and secret agent of said government of Germany" (R. Vol. I, p. 2)?

How can the intent of petitioner to give assistance to an alien, who had not been legally admitted into the United States, for his sole benefit, be constructed by implication and intendment into overt acts charged in the indictment (R. Vol. I. pp. 1-6) as the overt acts of treason with the intent and evil motive to adhere to and give aid and comfort to an enemy in the furtherance of the hostile designs of an enemy country? Assistance to, and harboring an alien, who had not been legally admitted to the United States, for his sole benefit is not treason. Petitioner respectfully urges if these acts were not treason at the instant they were made no lapse of time can make them so. *United States v. Burr,* 25 Fed. Cas. No. 14692.

III.

Witness Krug, an officer in the German Luftwaffe and a sworn adherent to the Nazi philosophy, could not testify as a competent witness in a criminal trial in a federal court.

Petitioner respectfully urges that the doctrine of the *Funk case* should not apply to the competency of witnesses generally, and serve to remove the disability placed upon certain classes of witnesses from the inception of our Federal Courts in abrogation of the doctrine established by *United States v. Reid,* 12 How. 361, affirmed and prevailing through the long line of decisions down to the *Funk case.*

Relying on the rights of persons as guaranteed in the Constitution Amendment VI, Petitioner respectfully submits that the right to be confronted with witnesses against him guarantees the defendant the right to be confronted with

COMPETENT WITNESSES and that "competency" as applied to witnesses involves both capacity and qualifications, and imparts existence of all essentials to render him fit to testify.

Petitioner in his brief to the Circuit Court of Appeals, Sixth Circuit, set out at length the reasons for his contention that Krug was an officer of the German Luftwaffe, adhering to the Nazi philosophy, wholly devoid of moral principles, and with such disregard of the sanctity of an oath or affirmation as to bar him from giving evidence in a capital case in a Federal Court of the United States.

The Honorable Circuit Court of Appeals in its opinion (R. Vol. II, pp. 26, 27) said: "This proposition was not raised at the trial and was probably waived by appellant's cross-examination of Krug. However, we think it not improper to discuss it briefly. When a witness takes the stand to testify, the law presumes that he is a competent witness, and incompetency must be shown by the party objecting to him. *Wharton on Criminal Evidence*, 10th Ed., Vol. 1, Sec. 358, p. 721."

Every accused having the constitutional right to counsel must rely wholly on his counsel. If the tactical errors of such counsel to raise proper and timely objection incurably waived an inviolable right of the defendant, to his damage, and prejudiced his interests and jeopardized his life and liberty it would be repugnant to those fundamental principles of liberty and justice guaranteed by the Sixth Amendment not to take full cognizance of those errors. "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Aetna Ins.*

Co. v. Kennedy, 301 U. S. 389; *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292; *Glasser v. United States,* 86 L. Ed. 405 (412).

Deciding against the contentions of petitioner in his appeal the Honorable Circuit Court of Appeals (R. Vol. II, p. 26) said: "It is said Krug was incompetent as a witness under the laws of Michigan and that the Federal Courts are bound thereby. Granted that this was the old rule, an important exception has been engrafted upon it. In *Funk v. United States,* 290 U. S. 371, the Court said in substance that in criminal cases federal courts are not bound by such rules but that in the development of truth they are to apply them as they have been modified by changed conditions." Petitioner urges that in the *Funk case* the sole inquiry went to the competency of a wife to testify in behalf of her husband in a criminal case; the question of her competency to testify against him was not before the court. In the *Benson case, Benson v. United States,* 146 U. S. 325, at p. 326, the question was whether the evidence of a wife was improperly admitted against her defendant husband in a criminal trial, and whether one Mary Rautzohn who had gained a severance was a competent witness against the defendant. In *Rosen v. United States,* 245 U. S. 467, at page 470, the Court said, "While the decision in *United States v. Reid, supra,* has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions in *Logan v. United States,* 144 U. S. 263, 301, and in *Benson v. United States,* 146 U. S. 325."

Even though the Court in deciding the *Rosen case* accepted the authority of the *Benson case* rather than that of the earlier decisions and disposed of the questions "in the light of general authority and sound reason," petitioner

respectfully urges that the reasoning in these two cases, which was affirmed in the *Funk case* (290 U. S. 371) could not have anticipated a situation in which a Nazi adherent would be offered as a witness by the prosecution in a criminal case in a federal court. This Court has said in *Funk v. United States* that "public policy is not fixed, but may change under changed conditions as regard competency," and following the words of the Court in the *Rosen case* petitioner urges that when the reason for the rule ceases to exist the rule itself ceases to exist. The reasons for the old rule founded on the Common-law disabilities and set out in *United States v. Reid,* 12 How. 361, was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest.

In the instant case, under unique and changed conditions, and consistent with the costitutional guaranty to be confronted by competent witnesses pursuant to the intention of the framers of the Constitution and in the light of the authority in the *Reid case* and the long line of decisions which accepted its authority, petitioner respectfully submits that the reason for the rule in the *Funk case* has ceased to exist; that Krug was not a competent witness in a criminal case in a federal court; that the oath of allegiance to Germany bound him unswervingly to the morally depraved philosophy that denies the existence of a power other than nature.

A witness must be bound in conscience. The competency of a witness in a capital case is to be measured by the doctrine, "When evidence is estimated quantatively it is the

support of the oath that counts." *United States v. Robinson*, 259 Fed. 691. Tested by the chaotic conditions now involving the world the philosophy and practices of the Nazi regime is raised to the level of the most heinous criminal philosophy in all history. If the rule in the *Funk case* should prevail it would become enlarged to the point where civil liberties would be threatened. If Krug is a competent witnes then it must follow that Rudolph Hess, the notorious Nazi leader now a prisoner of War in England, would likewise be competent to testify in a criminal case in a Federal court if the prosecutors for the Government would elect to call him. Public policy requires that the reason for the rule in the *Funk case* does not hold in the instant case. "We hold only that decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." *McNabb et al. v. The United States*, No. 25, October Term, 1942, Decided March 1, 1943.

IV.

The admissibility of incompetent, irrelevant, immaterial and obscene testimony, part of which was stricken too late, was highly prejudicial and incurable.

The legal presumption is that error produces prejudice. *Todd v. United States*, 221 Fed. 209, 210. It is beyond the limits of human belief to expect that any jury, sitting in a criminal case, after weeks of newspaper headlines and blasting radio newcasts had repeatedly been before the attention of the general public, the emotions of war, inciting passions and prejudices, everywhere expressed, could be entirely free from the dangers of that influence. "Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained." *Mattox v. United States*, 146 U. S. 140, 151. The presence of Krug in the full uniform of a Nazi Luftwaffe officer testifying as a Government witness was prejudicial to the defendant's rights because it incited hatred by continually reminding the jury of war and the hysteria accompanying it. The Von Werra matter (R. 70-73) was irrelevant and prejudicial. There was absolutely no connection between the Von Werra matter and the charges against the defendant. It was not harmles hearsay (R. 73) (R. Vol. 2, p. 32) because the entire testimony implied that there was a connection between the Von Werra matter and the instant case. Counsel objected (R. 71) the prosecution promised to connect it up, but never did, the court overruled the objection (R. 72). The error was not cured by instruction to the jury at any

time, nor referred to in the Charge of the Court. The testimony regarding Krug's relations with immoral women (R. 185-193) was obscene. "We are of the opinion that the ruling of the lower Court in refusing to exclude this testimony was prejudicial error." *Tootham v. United States,* 203 Fed. 220 The court, too late (a day and a half later), struck the testimony (R. 259-263) of these two women. The error was not cured. Error was committed when the testimony of Witness Parker (R. 201-208, 233) was admitted together with Exhibits 4, 9, 10, 12, 13 (R. 366). The error was not cured by striking the testimony too late (next day) (R. 259-263). The court did not exclude the erroneously admitted exhibits (R. 260) which were wholly incompetent, irrelevant and immaterial and damaged the substantial rights of the defendant. The entire testimony of the government witnesses was incompetent and irrelevant because none of it proved an intention to commit an overt act constituting a crime; all the testimony was corroborative of acts which lacked the essentials to raise them to the degree of overt acts constituting a crime. The evidence was cumulative and referred to extraneous matters. The words of this Honorable Court in *Boyd v. United States* is in point:

> "Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may

have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged." *Boyd v. United States,* 142 U. S. 450, 12 Sup. Ct. 392.

Referring to the signed statement of the petitioner (R. 223-226) the words of the Court in *United States in Fries, infra,* are pertinent, "We come now to the confession of the prisoner voluntarily made on his examination before Judge Peters. Here is a point of law relied on by the prisoner's counsel—that no man should be convicted of treason but on the evidence of two witnesses or upon confession in open court. * * * But happily our Constitution would not admit it if a hundred would swear to it. That danger is wisely avoided." *United States v. Fries,* 9 Fed. Cas. No. 5126, p. 914. The statement of defendant introduced (R. 217) objected to (R. 219) and admitted (R. 222) was not corroborative of any testimony to overt acts of treason and there were not two witnesses to any same overt act of treason as required by Constitution Art. 3, Sec. 3. The signed statement constituted the crux of the government's case against the petitioner. "Accordingly the question for our decision is whether the incriminating statements made under the circumstances we have summarized were properly admitted." *McNabb v. United States,* No. 25, October Term, 1942, decided March 1, 1943. This Honorable Court in the same case, *McNabb v. United States, supra,* at page 6, said: "It is true, as the petitioners assert, that a conviction in the federal court, the foundation of which is evidence obtained in disregard of liberties, deemed fundamental by the Constitution cannot stand." *Boyd v. United States,* 116 U. S. 616; *Weeks v. United States,* 232 U. S. 383; *Gouled v. United States,* 255 U. S. 298; *Amos v. United States,* 255 U. S. 313; *Agnello v. United States,* 269

U. S. 20; *Byars v. United States* 273 U. S. 28; *Grau v. United States,* 287 U. S. 124. And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questions of ignorant and untutored persons in whose minds the power of officers was greatly magnified,' *Lisbena v. California,* 314 U. S. 219, 239-40; or 'who have been unlawfully held in communicado without advice of friends or counsel,' *Ward v. Texas,* 316 U. S. 547, 555, and see *Brown v. Mississippi,* 297 U. S. 278; *Chambers v. Florida,* 309 U. S. 227; Canty v. Alabama, 309 U. S. 629; *White v. Texas,* 310 U. S. 530; *Lomax v. Texas,* 313 U. S. 544; *Vernon v. Alabama,* 313 U. S. 547." *(McNabb v. United States, supra.)*

V.

The general verdict of guilty as charged was a miscarriage of justice. There was fatal variance between the indictment and the proof, and a complete failure to submit any evidence of an overt act supported by the testimony of two witnesses to the same overt act essential to sustain the crime of treason.

In the case at bar the indictment charges (R. 15), generally, that the "giving of aid and comfort by said Stephan to said Peter Krug during April 18, 1942, and April 19, 1942, consisted in his receiving and treating with said Peter Krug, in his furnishing to said Peter Krug hospitality and entertainment, in his furnishing to and obtaining for said Peter Krug money, necessities of life, and personal effects, in his harboring said Peter Krug, in his concealing the identity of said Peter Krug, in his giving of false in-

formation to citizens of the United States and others with the intent to conceal the identity of said Peter Krug, in his arranging for and providing transportation and means of transportation in and about Detroit, Michigan and transportation and means of transportation from Detroit, Michigan to Chicago, Illinois, and his failure to report to proper public officials and to military officials, law enforcement agents, agents, representatives, immigration officials and Department of Justice officials and agents of the United States of America, the presence in the United States of said enemy Peter Krug." (R. 15)

The foregoing quoted verbatim from "Plaintiffs Requests to Charge" (R. 15) enumerates more concisely than a statement of facts the gist of the Government's charge in the indictment. The body of the indictment in the case at bar is in one count consisting of twelve overt acts containing a multiplicity of charges, some of which allege harboring an alien not legally admitted to the United States, some acts allege misprision, others allege aid and comfort for the sole benefit of an individual and none of the acts alleged in the indictment charge an overt act containing the essential elements of the crime of treason. It has been uniformly held that neither utterances nor meeting and conspiring ever amount to overt acts of treason. *Wimmer v. United States,* 264 Fed. 11, 12, 13; *Ex parte Bollman,* 8 U. S. (4 Cranch) 75; *United States v. Hoxie,* 26 Fed. Cas. No. 15407, p. 399. "The crime of treason should not be extended by construction to doubtful cases" *Ex parte Bollman,* 8 U. S. (4 Cranch) 75. "The doctrine of constructive treason has produced much real mischief in another country; and it has been, for an age the subject of discussion among lawyers, other public speakers, and political writers." *United States v. Fries,* 9 Fed. Cas. No. 5126 at p. 909. In

Wolf v. United States, 259 Fed. 388 at page 394 the Circuit Court of Appeals, Eighth Circuit said: "The greatest danger to justice from a jury is through a confusion of the real issues in the case", and the case of *McElroy v. United States*, 164 U. S. 76, at page 80 enlarges upon the need to confine the indictment to one distinct offense.

The motion for Directed Verdict (R. 236), denied (R. 237) was predicated upon the total lack of proof sufficient to prove an overt act of treason.

Marshall C. J. speaking in *United States v. Burr*, 25 Fed. Case No. 14693, at pp. 179, 180, says:

> "The Constitution and law require that the fact be established by two witnesses. Not by the establishment of other facts from which the jury might reason to the fact. The testimony then is not relevant. If it can be introduced, it is only in the character of corroborative or confirmatory testimony, after the overt act has been proved by two witnesses in such manner that the question of fact ought to be left with the jury. * * * That overt act must be proved according to the mandates of the Constitution and of the Act of Congress by two witnesses. It is not proved by a single witness."

Petitioner urges that "all the circumstances as proved must be consistent with each other, and they are to be taken together as proved. Being consistent with each other and taken together they must point surely and unerringly in the direction of guilt. All the facts and circumstances taken together as proved must not only be consistent with the inference that the accused is guilty, but they must at the same time be inconsistent with the hypothesis that he is innocent and with every other rational hypothesis. Mere suspicions, probabilities or suppositions do not warrant a

conviction." Underhill's Criminal Law (4th Ed.) at p. 23. "It is a positive rule of criminal procedure that the accused shall not be charged with one crime and convicted of another," *The Hoppet,* 7 Cranch 389 (394), 3 Law Ed. 380. In *Wolf v. United States,* 259 Fed. 388, at page 394, the court said, " * * * Patriotism must not become, even innocently, a cloak for injustice. The right of an accused in the courts of this nation to a fair trial must not vary with the character of the crime." The law of treason is carefully reviewed in *United States v. Robinson,* 259 Fed. 685, and Petitioner urges that the reasoning of this case fairly indicates the necessity for the jury to specify the particular overt act of treason of which they find the defendant guilty, where more than one overt act is alleged in one count in the indictment.

A sentence cannot rest upon a general verdict of guilty, where the indictment charges several alleged offenses, the nature of which are not identical, especially where none of the offenses charged contain the essential elements necessary to charge the crime of treason. Some of the acts charged in the present indictment partake of and consist in charges of other offenses, namely, the crime of harboring and assisting an alien not legally admitted to the United States, and other acts which cannot be classified as crimes of any sort.

> "In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the jury, or otherwise, that it is the settled rule in England and in many of our States, to confine the indictment to one distinct offense or restrict the evidence to one transaction." *McElroy v. United States,* 164 U. S. 76, at page 80.

Petitioner respectfully submits that the Honorable District Court erred in denying the motion for Directed Verdict (R. 237, 238). "The Constitution having declared that treason shall consist only in levying war, and having made the proof of overt acts necessary to a conviction is a question of vast importance, which it would be proper for the Supreme Court to take fit occasion to decide, but which an inferior tribunal will not willingly determine unless the case before it should require it." 25 Fed. Cas. No. 14693, at page 181. In the case at bar the charge of harboring and giving assistance to an alien illegally admitted to the United States was raised to the dignity of a charge of treason consisting a fatal variance between the indictment and proof.

VI.

The United States District Attorneys made repeated reference to the fact that no witness had testified for the defense, resorted to intemperate, improper remarks and by inference, implication and innuendo incited passion in the jury in violation of defendant-petitioner's substantial rights.

Petitioner urges that, "no man feeling a correct sense of the importance which ought to be attached by all to a fair and impartial administration of justice, especially in criminal prosecution, can view without extreme solicitude, any attempt which may be made to prejudice the public judgment, and to try any person, not by the laws of his country and the testimony exhibited against him, but by public feelings, which may be and often are artifically excited against the innocent as well as the guilty." 25 Fed. Case No. 14692

b), at p. 27. A prosecutor must be fair, he must draw a careful line (R. 305); he should not seek to arouse passion or engender prejudice. Comments by the United States District Attorney, direct or indirect, upon the defendant's failure to testify, constitute misconduct on his part, and is *per se* grounds for reversal of a judgment of conviction. In the case at bar the United States Attorney made very definite reference to the failure of defendant to testify when he said (R. 305), "Why in the name of heaven didn't he bring some witnesses in here to contradict what Krug said?" well knowing that the defendant was the only witness who could refute Krug's testimony. On objection the Court said (R. 305), "Mr. Lehr, I can see crossed the line * * *," but the District Attorney immediately afterward said (R. 305), "Krug's statement stands on the record, ladies and gentlemen of the jury, absolutely uncontradicted."

Petitioner in his original pettiion urged (Orig. Pet. pp. 74-82) that the doctrine of *Berger v. United States,* 295 U. S. 88, 89, be invoked and respectfully submitted that a mistrial should have been ordered by the trial court. These are times of war when the passions and feelings run high and a more solemn duty rests upon the court to guarantee that fair trial which the Constitution guarantees. The prosecuting attorney at the outcome of his argument (R. 300) called attention to the War, as a prelude for his plea for a verdict of guilty; he intimated broadly that the death penalty would not be invoked (R. 303), then proceeded in his argument to denounce the defendant as "a traitor, a blackhearted traitor" (R. 306) (R. 307) and continued to incite prejudice and passion by appealing to the patriotism of the jury (R. 303, 304, 309, 310, 313) and then (R. 317):

> "You ladies and gentlemen of the jury, today, in these days of war, when our boys are on the front facing

> the firing squads in order to protect America, you twelve men and women here in this jury box, in this Federal Court room, constitute the very front line of defense of this country in behalf of protecting the internal security of America, and in that sense, ladies and gentlemen, your Government, my Government—God forbid, Max Stephan's Government, asks you to return a verdict of guilty as charged."

The district attorney well knew that the witness on which the Government relied was a prisoner of War (R. 37, 38, 83, 115, 116, 119, 304, 307), an alien who had illegally entered the United States. Petitioner urges that the closing argument of the district attorney incurably prejudiced his substantial rights and a mistrial should have been ordered by the Court instanter.

VII.

Petitioner urges that the court failed to charge with definiteness, clarity and certainty as to what constitutes overt acts in adhering to and giving aid and comfort to an enemy country, and omitted to charge on other requisites.

In the case at bar the entire record went up to the Circuit Court of Appeals, Sixth Circuit, as a settled Bill of Exceptions. Petitioner's counsel, not having been the attorneys on the trial, and the record being almost devoid of proper and timely objections, relied solely on the doctrine that on appeal in a capital case the Court, after an examination of the entire record, will consider the evidence as disclosed by the record to determine whether it was sufficient to support

a verdict, without regard to technical errors, although the questions were not properly raised by objections below, where the refusal to review would shock the judicial conscience. *Weems v. United States,* 217 U. S. 349, 30 Sup. Ct. 544; *cf. Lomax v. United States,* 37 App. (D. C.) 414; *Safford v. United States,* 233 Fed. 495; *Dejianne v. United States,* 282 Fed. 739; *Pace v. United States,* 27 Fed. (2d) 519; *Kelly v. United States,* 76 Fed. (2d) 847; *Alberty v. United States,* 91 Fed. (2d) 461.

Petitioner respectfully submits that the charge is presumed to be for the assistance of the jury and must, therefore, be so presented in such language that it shall be understandable. The charge must be responsive to the matter under consideration and the language of the Court is the only proper evidence of what the law is on the facts in the possession of the jury so that they may determine the issue according to the law and the evidence. This requirement is not filled by an abstract exposition of legal principles. The jury, under the impressiveness and dignity of the judicial office, the venerable and upright character of its occupant, and the learning, acumen and experience which the judge is assumed to possess are unconsciously influenced to accept everything that comes from his lips as authoritative and they permit his opinions upon the issues of fact involved, so far as he may announce them, to guide them in their deliberations.

Petitioner urges that the crime of treason, is of rare occurrence. The public, generally, are unaware of the elements necessary to constitute the crime of treason and a jury could not of common knowledge be aware of the essential elements of the crime, and, regardless of an hundred facts placed before them in evidence, they could not be ex-

pected to apply those facts in reaching a correct verdict without careful painstaking,comprehensive instruction as to the law on the facts.

It has remained for the courts to interpret what constitutes the overt acts of "adhering to, giving aid and comfort" to an enemy and from a diligent search of the cases reported it is clear that the courts have done so only with extreme caution and obvious reluctance to construct alleged acts from misdemeanors to the dignity of the high crime of treason. *United States v. Burr*, 25 Fed. Cases No. 14692, 14693; Fed. Case No. 18,276 (2 Wall Jr. 134); *United States v. Herberger*, 272 Fed. 290, quoting 30 Fed. Cas. No. 18,272; *Ex parte Bollman* 8 U. S. (4 Cranch) 75; *United States v. Fricke*, 259 Fed. 673; *United States v. Robinson*, 259 Fed. 690.

The jury, of course, are bound to follow the law as given to them by the judge. *Carrol v. United States*, 16 Fed. (2d) 951. The rule as to confessions seems to be, if the court determines its admissability, (R. 222) that the Court is to submit the question to the jury with proper instructions upon it. *Wilson v. United States*, 162 U. S. 623. The Court in its charge omitted to instruct on the admissability of the statement (R. 222-226) and omitted to instruct the jury that the Constitution required anything in the nature of a confession to be a "confession in open Court" and that no confession could be admitted in evidence, except as corroborative or confirmatory until two witness had testified to the same overt act of treason.

The "Von Werra matter" (R. 70-73) was incompetent, irrelevant and prejudicial to the defendant's substantial rights. Its admissability was objected to (R. 71) but overruled (R. 71-72), the court at the time saying, R. 72) "Well,

I will overrule the objection, but unless it is connected up I will strike it out." The Court never again referred to the matter on the trial nor in his charge. It was never connected up, nor ever struck from the record although it was irrelevant, incompetent and highly prejudicial. The United States District Attorney stated to the court that the "Von Werra matter" was irrelevant to the instant case but was important to another case (R. 71). "Mr. Babcock: Not yet, but I submit to the court that we will connect it up * * * * * not necessarily with this case, but the corroboration of it appearing, the conversation, and I think it is rather important." The district attorney prosecuting the accused on the charge of treason prejudiced the substantial rights of the defendant by introducing evidence of "another case". The Court was under a duty to strike the Von Werra matter and seasonably and properly instruct the jury so that this matter could not have been before them in the jury room during their deliberations to the prejudice of defendant's rights.

Petitioner respectfully submits that the charge of the court (R. 318-341) was not comprehensive and clear as to the law on the facts of what constitute "overt acts of treason"; that the reading of the words "a secret agent for, spy for, and secret representative of the said government of Germany", brought to the attention of the jury for the first time on the trial by the court in its charge was prejudicial error, inasmuch as the indictment had not been read to the jury, and they had not heard the inflammatory words before, nor had they been subject to any testimony or evidence to support the allegation. No attempt was made to cure, explain or rule out the phrase; they stood alone, an incurably prejudicial group of words which, coming from the court in its charge, had all the force the jury under their

oath were bound to heed. "It is required that it (courts instruction) be so framed that a jury may not draw the wrong conclusion therefrom." *Miller v. United States,* 120 Fed. (2d) 972, and because thereof the jury were misled and confused in their deliberations thereby denying the defendant a fair and impartial trial.

VIII.

A fair and impartial trial was denied because the jury were not secluded.

Petitioner respectfully submits that the isolation of the jury and its aloofness and its care by trained and trustworthy bailiffs ought never to be abrogated. It is a protection to the jury itself. It is a protection to the prosecution. It is a protection to the defendant. It is not alone necessary to avoid evil—the thoughtful man avoids the appearance even thereof. The jury should all be kept together and it is unsafe to make any other rule.

In the case at bar the jury were drawn from a public exposed to frequent newspaper publications and radio newscasts at a time when the unhappy conditions arising out of the unnatural struggles of people at war creates new relations among the citizens, when people are confused, apprehensive and fearful, when feelings run high and passions rise.

This war involves the entire world, and the "melting pot" of the world, of which this District is strikingly representative, has not succeeded in refining the thoughts and

feelings of its polynationals to the degree that warrants and permits freedom from prejudice and bias predicated upon conditions abroad, where the very closest relatives of the foreign born American citizens are involved in this catastrophic world war.

In the present day and age, the courts take judicial notice of radio newscasts, newspaper publications that literally dramatize the events and color their news articles with editorial opinions, trying lawsuits before trial by inference, implication and innuendo. The Courts rightfully take judicial notice of the obvious.

On appeal to the Circuit Court of Appeals, Sixth Circuit, error was assigned that the court erred in exposing the jury to undue outside influences and public sentiment by not placing the jury in custody throughout the entire trial. The Honorable Circuit Court of Appeals in its opinion (R. Vol. II. p. 36) said, "There is nothing to indicate the appellant was in the least prejudiced by the separation of the jury." *Holt v. United States,* 218 U. S. 245, 251.

Petitioner in his brief in support of the original petition (B. 90-94) prayed that the circumstances surrounding the case at bar did not give defendant the fair trial which was his "sacred right." "There is no right more sacred than the right to a fair trial. There is no wrong more grievious than its negations. Jurors are human. * * * Any course is clearly illegal which would expose them to the danger of influence outside the court. If a single juror is improperly influenced, the verdict is as unfair as if all were. * * * The whole jury was exposed to, and actually encountered an outside influence." *Stone v. United States,* 113 Fed. (2d) 70 (C. C. A. 6th). The Brief for the United States in opposi-

tion to the original petition (P. 34) relies on *Holt v. United States*, as did the Honorable Circuit Court of Appeals, and argues that both the United States Attorney and Counsel for defendant informed the court that neither of them desired seclusion of the jury. Petitioner respectfully submits that trial counsel could not relinquish any substantial rights of the defendant and by the obvious tactical error of failure to insist that the jury be secluded did damage and prejudice defendant's rights to a fair and impartial trial. It is idle to say that "there is nothing in this record to indicate that the verdict returned reflected the jury's consideration of anything except competent proof adduced in the court room" (Br. for the United States in opposition, p. 34). The jury separated after each session of the Court to go to lunch at noon, and to their respective homes each night with nothing to protect them from exposure to hostile sentiment and outside influences except the admonition of the Court (R. Vol. II, pp. 7-13, 36). "When the judgment is weak, prejudice is strong, and it is essential to faith in the jury system that jurors should determine the facts submitted to them wholly on the evidence offered in open court, unbiased and uninfluenced by anything they may have seen and heard outside the actual trial of the case." *Stone v. United States*, 113 Fed (2d) 70. In the famous "Hat Trimming Case" *Meyer et al. v. Cadwalader*, 49 Fed. 32, Judge Acheson set aside a verdict in favor of the Government because of articles which had appeared in several newspapers of general circulation published in Philadelphia. *United States v. Ogden*, 105 Fed. 371.

"It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals and were scattered

broadcast over the community. The jury separated at the close of each session of the Court, and it is incredible that, going out into the community they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it." *Meyer et al. v. Calwalader*, 49 Fed. 32; *United States v. Ogden*, 105 Fed. 371; *cf. Griffin v. United States*, 295 Fed. 439; *Harrison v. United States*, 200 Fed. 669.

The case at bar is of vast importance to the federal jurisprudence and to the civil rights of the people. Careful study of *Holt v. United States* impels the Petitioner herein to pray that the principles therein announced do not decisively preclude him from the sacred right of a fair and impartial trial by the safeguard of a secluded jury in a capital case, particularly where the charge is treason.

IX.

The sentence is wholly disproportionate to the offense charged.

Petitioner respectfully directs the attention of this Honorable Court to the "Statement of Facts" in the Original Brief for Petition for a Writ of Certiorari (B. 26-29) "Plaintiff's Request to Charge" (R. 15), the opinion of the Circuit Court of Appeals, Sixth Circuit (R. Vol. II, p. 16), and the Indictment (R. 2-6) for a complete recital of the twelve acts charged as overt acts of treason.

A sentence cannot rest upon a general verdict of guilty where the indictment charges several alleged offenses (*McElroy v. United States*, 164 U. S. 76).

It is the duty of the Court to construe the penal provisions of statutes within the limitations prescribed by the Constitution Amendment VIII. To punish treason with either death or imprisonment lies within the discretion of the court but petitioner avers that "the provision of the Federal Constitution prohibiting cruel and unusual punishment is addressed to the Courts of the United States having criminal jurisdiction and is a limitation on their discretion." *Ex parte Watkins*, 7 Peters (U. S.) 568, 8 L. Ed. 786.

In the case at bar petitioner was charged with acts which do not contain the essential elements of a crime of any class. The proof adduced on the trial was irrelevant, incompetent and immaterial to the charge of treason; the general verdict of guilty as charged is in return to an indictment that is defective in substance, *United States v. Cruikshank*, 92 U. S. 542, 556; *cf. United States v. Carll* 105 U. S. 611; *United States v. Britton*, 107 U. S. 665, 669; *Evans v. United States*, 153 U. S. 587; the record is devoid of evidence adduced on the trial to prove overt acts of treason and no two witnesses testified to the same overt act of treason; the record fails to prove that the defendant had that condemned attitude of mind or committed any hostile act that exposed him as a traitor at heart or in fact; *United States v. Werner*, 247 Fed. 709; *United States v. Fries*, 9 Fed. Cas. No. 5126, p. 914; *United States v. Hanaway*, Fed. Cas. No. 15299 (2 Wall. Jr. 139); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75; and that every act charged and proved was an act of assistance to an individual for his sole benefit.

"In determining whether defendant is guilty of adhering to, and giving aid and comfort the question of intent is a vital ingredient of the crime; and though he assisted an enemy alien, whom he knew to be such, he is not guilty where he intended merely to assist him as an individual, and not to give aid and comfort to enemies of the United States." *United v. States v. Fricke*, 259 Fed. 673.

Petitioner respectfully submits that he may be guilty of some violation of law, but that he is not guilty of the crime of treason and should not suffer the extreme penalty of death in violation of his substantial rights to his life and liberty as guaranteed him by the Constitution Amendment VI, Amendment VIII and Amendment XIV, Sec. 1.

What constitutes the elements essential to constitute an overt act of treason has never been determined by the Supreme Court of the United States or any inferior tribunal, and petitioner believing that it is a question vital to the people and to the federal jurisprudence prays that this Honorable Court hear the petitioner and set aside the sentence of death. "In times like these, when the public mind is agitated, when wars and rumors of war, plots, conspiracies and treasons excite alarm, it is the duty of the court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby establish precedents, which may become the ready tools of factions in times most disastrous. The worst of precedents may be established from the best of motives. We ought to be on our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may bring one criminal to punishment, we may furnish the means by which an hundred innocent persons

may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity, there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude." *United States v. Bollman*, 8 U. S. 75; *cf. United States v. Hoxie*, 26 Fed. Cas. No. 15407, at p. 399.

Conclusion

For the foregoing reasons petitioners respectfully urge that a rehearing be granted, that upon further consideration the order of April 5, 1943, denying petitioner a writ of certiorari be revoked, and that a writ of certiorari issue to the Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

NICHOLAS SALOWICH,
JAMES E. McCABE,
Counsel for Petitioner.

Certificate

We, the counsel for petitioner, hereby certify that the foregoing petition for rehearing is made in good faith and not for the purpose of delay.

NICHOLAS SALOWICH,
JAMES E. McCABE.